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SUBJECT: CORRUPTION IN KENYA: LOOKING BACK, LOOKING FORWARD

REF: A. NAIROBI 539

- [1](#)B. IIR 6 854 0118 05 (NOTAL)
- [1](#)C. IIR 6 854 0169 05 (NOTAL)
- [1](#)D. NAIROBI 1425
- [1](#)E. NAIROBI 1593
- [1](#)F. IIR 6 854 0211 05 (NOTAL)
- [1](#)G. NAIROBI 0278
- [1](#)H. IIR 6 854 0217 05 (NOTAL)

Classified By: ECON COUNSELOR JOHN HOOVER FOR REASONS 1.4 (B) AND (D).

[1](#)1. (C) Summary: More than six months after the Government of Kenya's anti-graft credentials all but disappeared, the country is at a crossroads in the war on corruption. On the one hand, senior civil servants are driving a series of systemic reforms and improvements in the country's legal and institutional framework - with some good results. A fully staffed and competent Kenya Anti-Corruption Commission, combined with other reforms, has made it harder for networks of well-placed officials and businessmen to engage in grand scale theft. On the other hand, structural impediments in the legal system continue to make it almost impossible to secure convictions of corrupt high-level officials. More disturbing, however, is the continued lack of political will on the part of President Kibaki and his ministers in leading the charge and taking decisive action to restore the government's still-battered credibility. In fact, the senior political leadership seems determined to avoid any investigation into its own membership. The GOK is keeping secret the details of a series of large, security-related

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procurement scams, and Kibaki took the path of least resistance when recently confronted with evidence of grand scale theft on the part of the country's senior-most military leadership. We expect no change in the leadership's lack of willingness to act against specific cases of high-level graft, but believe we should continue to support the underlying institutional reforms that are slowly beginning to make a difference. End summary.

Corruption Still at the Top of the List

[1](#)2. (C) Corruption - and what the Kenyan Government is or is not doing to fight it - continues to be a central issue in the broader debate over the country's political and economic future. However, the tenor of this debate, both in public and privately among development partners, has shifted slowly and subtly in the months since early February, when the resignation of anti-corruption czar John Githongo sent shock waves through the donor community and plunged the GOK into a crisis of confidence - a crisis fed by valid perceptions of unchecked high-level corruption within the government's own senior ranks (refs A and D).

[1](#)3. (C) Since that time, some things have changed for the better; others not at all. In the context of the upcoming World Bank/IMF meetings and the imminent review by the Millennium Challenge Corporation (MCC) of the latest draft of Kenya's Threshold Program concept paper, now is a useful moment to look at what has happened, what hasn't, and to suggest where the USG might go from here in dealing with corruption in Kenya.

Emphasizing Laws and Institutions - With Success

[1](#)4. (C) On September 12, Justice Minister Kiraitu Murungi re-emphasized the GOK's oft-stated intention to focus primarily on strengthening the country's legal and institutional framework as the best way to wage war on corruption. The occasion was a "stakeholders forum" organized by the GOK to report and assess progress on the GOK's "Comprehensive Anti-Corruption Strategy Action Plan." As some will recall, the Action Plan was unveiled in haste prior to the GOK-World Bank Consultative Group meetings in

April (ref E). The Action Plan was (and still is) an attempt to assure donors - and the Kenyan public - that the GOK is serious about fighting corruption. Perceptions of its success shift depending on how one looks at the issue.

15. (SBU) From the perspective of strengthening the country's legal and institutional machinery for fighting corruption, the September 12 review of the Action Plan revealed that the GOK has indeed made important substantive progress over the past several months. First, on the legislative front:

-- The Procurement Bill: A concerted campaign by the Finance Ministry and others led to passage August 4 of the Public Procurement and Disposal Bill, which is meant to overhaul the country's procurement practices, in which many observers believe as much as 80% of official corruption in Kenya takes place. The bill still awaits Presidential assent and implementation.

-- The Privatization Bill: Kenya's many remaining parastatals continue to function more as springboards for patronage and corruption than as genuine service providers. The Privatization Bill, passed by Parliament on August 10, is meant to convert parastatals into competitive private firms, with the ancillary benefit of reducing the major role played by the parastatal sector in the corruption problem in Kenya. The bill still awaits Presidential assent and implementation.

-- The Statute Law (Miscellaneous) Bill: This omnibus bill contains a potpourri of amendments to existing laws, including the Anti-Corruption and Economic Crimes Act and the Public Officers Ethics Act. Inter alia, it would strengthen the powers of the Kenya Anti-Corruption Commission (KACC) and require senior GOK officials make their declarations public and to submit them to the KACC for verification (currently, the declarations are confidential and thus virtually meaningless - see para 14 below). The bill was submitted to Parliament in April, but withdrawn by the GOK so that additional, unrelated amendments could be added. The GOK says it will resubmit the bill and secure passage in October.

-- Other Bills: Other anti-corruption-related legislation, at various stages of preparation but not yet submitted to or passed by Parliament, include: a Whistleblowers/Witness Protection Bill, a Political Parties Bill (which, it is hoped, will reduce incentives to steal public funds to finance political campaigns), an Anti-Money Laundering Bill, and a new Companies Bill to improve accountability in the private sector.

Despite this progress, it remains unclear whether the momentum established by passage in August of the Procurement and Privatization Bills can be sustained in the face of a generally unproductive Parliament and the inevitable distractions of the country's upcoming Constitutional referendum. The fate of key bills not yet passed, such as the Statute Law, thus remain in limbo.

Strengthening the Institutional Capacity Against Graft

16. (SBU) On the institutional front, there has also been progress, most notably at the Kenya Anti-Corruption Commission. The KACC, on which the hopes of many rest, was fully staffed as of August 1 with 212 officers, and KACC Commissioner Aaron Ringera and other KACC officials claim the investigative body is pressing full steam ahead in aggressively uncovering corruption cases for prosecution by the Attorney General. Ringera told Econ/C on August 29 that KACC is investigating over 400 cases of alleged corruption currently, including several involving government ministers. While there is little transparency concerning the details, the KACC also claims that it has referred 61 cases to the AG's office that are now in court, and that 22 additional cases have been conveyed to the AG awaiting disposition. Eight of the cases under investigation, Ringera claims, are among the 20 presented early in 2005 by British High Commissioner Edward Clay to President Kibaki as highly suspicious and worthy of investigation.

17. (SBU) In its Action Plan update, the GOK also claims credit for other improvements in the country's investigative, preventive, and prosecutorial infrastructure, including:

-- ongoing efforts to expand and strengthen the capacity of the Department of Public Prosecution (DPP). The DPP is widely seen as a bottleneck in the prosecution of justice generally. (Note: USAID and the Embassy's Resident Legal Advisor are intimately involved in training DPP prosecutors as part of this effort. End note).

-- expansion of the authority and capacity of the Kenya National Audit Office.

-- publication of the Ndungu Land Report and the beginning of efforts to recover land illegally or irregularly allocated in the past.

-- completion by October of the final report of the

Goldenburg Commission, established to investigate a massive foreign exchange rebate scam which occurred over a decade ago. The GOK says it will develop an Action Plan for prosecuting or sanctioning wrongdoers by December. -- a series of inter-related reforms and modernization, spearheaded by the Finance Ministry, of Kenya's budget planning, public expenditure and debt management systems. -- imminent increases in the number of judges in the judicial system.

Grand Scale Corruption: Frozen in Place - For Now

18. (C) In his September 12 remarks, Minister Murungi reiterated an oft-heard claim: that due to improvements in the legal and institutional framework for fighting corruption, grand scale corruption along the lines of the Anglo-Leasing scandal has been stopped in its tracks (see para 12 below for more information on the Anglo-Leasing scandal). KACC Director Aaron Ringera made the same point to Econ/C August 29, arguing that KACC's growing investigative prowess and greater general scrutiny of large government procurement projects have meant that the longstanding networks of corrupt businessmen who insinuated themselves into the NARC administration in 2003 are now "frozen." This sentiment is echoed by a number of observers in the international community, who see little evidence of newly-hatched, large-scale scandals within the senior ranks of the Kibaki government. Like Ringera, they credit ongoing improvements in the way major procurements are being processed and scrutinized, especially by the Finance Ministry, and they also sense a more general change -- from an atmosphere of impunity to one of greater fear on the part of government officials of being investigated, exposed, and/or prosecuted for wrongdoing.

One Major Glitch: Prosecutions Next to Impossible

19. (C) The Embassy agrees that at the very least, it has become harder to engage in grand scale theft, and we commend the progress being made, primarily by officials at the Permanent Secretary-level of the Finance and Justice ministries, on the legal and institutional fronts. That said, there remain major problems and weaknesses that continue to undermine the success of the overall effort against graft. One such issue is the inability of the GOK to secure successful prosecutions in corruption cases. In his speech to donors and civil society in April (ref E), Justice Minister Murungi called 2005 "the year of action," by which he meant cases would be investigated and wrongdoers tried and convicted. Unfortunately, not a single major corruption conviction has been obtained since then. Indeed, only one senior level GOK official has been convicted while in office since the NARC regime came to power in 2002, and that official was subsequently released under a general amnesty.

110. (SBU) The wheels of justice grind slowly in Kenya in part because of a severe lack of both quantity and quality in the DPP, as noted above. After being eviscerated politically under the previous regime, the DPP requires more prosecutors, technical assistance, money, training, internal reform, greater independence from the political leadership - and not least, time - before it will be fully effective in prosecuting justice across-the-board, let alone in complex white-collar crime cases in which they are up against well-paid defense lawyers.

111. (SBU) Increasingly emerging as another, related impediment are the rules of court procedure, which hinder even competent, aggressive prosecutors. The weapons of choice are constitutional challenges by defendants, which lead automatically under current court rules to a stay of the criminal case until the constitutional challenge (or "reference") is resolved. Clever defense lawyers defending corrupt officials often file a never-ending series of back-to-back constitutional references (and/or use other delaying tactics), effectively making it impossible for criminal cases against corruption to ever move forward and see the light of day. Currently, there appears to be neither a mechanism nor the will to weed out frivolous constitutional appeals, or to allow criminal cases to run concurrently while constitutional references are being heard. The GOK is beginning to recognize this problem as a major impediment and participants at the September 12 event were told the Chief Justice has been asked to look into how it can be fixed.

Anglo-Leasing Prosecution: Going Nowhere

112. (C) The inability of Kenya's legal system to prosecute corruption is nowhere more evident than in its pursuit of the \$93 million Anglo-Leasing scandals, which rocked the Kibaki

administration beginning in April, 2004, and which continues to hang over the administration like a dark cloud, still unresolved. When the GOK finally went to court in February 2004, no ministers were named as culprits, but the GOK charged three former permanent secretaries and three other mid-level officials. A preliminary hearing in March was postponed when the DPP failed to provide defense counsel with requisite documents, and then the six defendants all filed constitutional references in the case. With this constitutional reference in play, it appears likely the cases will drag out until at least October, when a ruling on the reference is finally expected.

The Still-Missing Elements: Transparency and Political Will

13. (C) Of greater concern than the inability of the justice system to prosecute corruption cases is the one critical element in the war on corruption that is still missing: political will on the part of President Kibaki and the country's senior leaders. The difficulty in obtaining convictions only highlights the need for Kibaki to use the administrative powers and political authority at his disposal to take tangible action to restore the administration's still-tarnished credibility and provide momentum in the war on graft. The simplest such action would be dismissing or asking ministers or others suspected of wrongdoing to step aside pending full investigations. In a refreshingly candid comment, new World Bank Country Director Colin Bruce told GOK officials at the September 12 stakeholders forum that the government's credibility in the graft war remains low, and would always be in question until the GOK leadership begins to follow the international trend of holding high-level officials more accountable for their actions, and of dismissing ministers, fairly or unfairly, when a perception of wrongdoing undermines confidence in government. But the advice seems to fall on deaf ears.

14. (C) The leadership's behavior suggests it remains utterly unwilling to lead the charge in this way. One illustration has been the GOK's response to calls for greater transparency and scrutiny of wealth declarations. Under the current law, the declarations are sealed, and can only be unsealed in cases of probable cause in a criminal investigation. As such, they are in many respects a sham. The GOK response to pressure to make the declarations more useful is to propose changing the Public Officers Ethics Act to require submission of declarations to the KACC for verification (para 5 above). Donors and civil society have repeatedly suggested that the President short-circuit what could be a drawn out legislative process by simply asking his ministers and advisors to voluntarily submit their declarations - as a way to restore credibility and enhance transparency generally. But such calls have been met with silence, largely due to a political culture at the top that refuses to see the need for maintaining higher standards of ethics for government officials.

15. (C) Even more revealing is the unwillingness of the leadership to make transparent and act decisively on the findings of an audit of 18 large, security-related procurement deals begun in the Moi era but inherited by the NARC government in mid-stream, many under the purview and then-Minister of National Security (and now Minister of Transport) Chris Murungaru, widely seen as the NARC's corruption kingpin. Following preliminary investigations by former anti-corruption czar John Githongo in 2003 and 2004, the GOK under the leadership of the Finance Ministry froze payments on the 18 suspect deals, which are believed to have followed a similar pattern to the Anglo-Leasing scam: identification of often non-essential but big-ticket, security-related projects by a small network of private businessmen working with senior insiders in government; secretive procurement processes cloaked under the guise of

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national security; and massive overpayment for goods and services received - if goods and services are received at all.

The Navy Frigate Scandal

16. (C) One such scam among the 18 is the acquisition by the Kenyan Navy of a frigate being procured from a firm called Euromarine, which in turn contracted construction to Spanish shipbuilders Astilleros Gondan SA Shipyard (refs B and C). The existence of the ship tender was the subject of rumors for months after the Anglo-Leasing scandals broke, but was not confirmed until February, 2005 by the Kenyan Department of Defense (KDOD). KDOD vehemently denied any irregularities in the tender, which it claimed was competitive and proper. This, however, is not the case. Subsequent credible reports have the ship being delivered to Kenya as a civilian vessel that will require expensive

military retrofitting later, fueling suspicions that the purchase price was vastly inflated. Further, reporting in other channels puts veteran corrupt businessman Anul Perera in the middle of the deal, though he is now frustrated that payments are not being made. Finance Permanent Secretary Joseph Kinyua told Econ/C on August 16 that the internal audit of the frigate deal found that the country was not "buying air," i.e. that the ship actually exists, but that the purchase price (believed to be around \$51 million) is four times what it should be. He said payments on the contract remain frozen, but that the GOK faces a quandary because it is contractually obligated to pay. Kinyua said the GOK will likely attempt to renegotiate the deal for better terms.

The Communications Center Scandal

17. (C) A similar scandal, but one which crossed the finish line before all payments could be frozen, was the construction of a communications center for KDOD on the southern outskirts of Nairobi. Little is known about the deal except what is reported ref F: that the commcenter appeared almost mysteriously out of thin air, with no reference to KDOD's procurement plan, and was likely constructed for "personal gain" on the part of senior KDOD officials.

Reaction to KDOD Scandals: No Accountability, No Will

18. (C) The official response to the frigate and commcenter scandals (and whatever else is being uncovered in the audits and investigations into the remaining security-related deals) speaks volumes about the contradictions in Kenya's stance on corruption. On the one hand, institutionally, the scandals are being investigated by the KACC, just as they should be. KACC Director Ringera told Econ/C that he successfully pushed for unprecedented access to KDOD files and personnel in investigating both the frigate and commcenter cases. He built strong cases, directly confronted then-Chairman of the Joint Chiefs of Staff Joseph Kibwana, and took the files twice to President Kibaki to present evidence of graft on the part of Kibwana and others.

19. (C) The response by President Kibaki to Ringera's findings makes clear the corresponding failure of political will to deal with massive corruption within the GOK's own ranks. As reported ref I, Kibaki on August 10 announced a major change in the KDOD leadership, including the retirement of Kibwana and Vice Chief of Staff Nick Leshan. Both were given post-retirement jobs as Chairmen of the Kenya Ports Authority and the Kenya Meat Commission respectively. Ringera argued that the shake-up amounted to "administrative action" by Kibaki against corruption, and sees it as a personal victory. Econ/C pointed out that not only are the KDOD brass not being prosecuted and/or exposed publicly, but are being given plush golden parachutes in retirement. In short, with his back to the wall, and with overwhelming evidence from Ringera in hand, Kibaki did the absolute least possible to avoid actually having to name, shame, and/or prosecute fellow senior officials on his watch.

Is KACC Compromised?

20. (C) More disturbing are persistent claims that Ringera himself is on a short leash, and that aggressive investigations into standing ministers are off-limits to KACC. Environment Minister Kalonzo Musyoka told the Ambassador in July that he had heard from two sources, including a close advisor to Kibaki, that State House had instructed KACC to stay away from investigating standing ministers (ref G). A visiting IMF official told the Ambassador August 18 that Ringera himself had told him that KACC had recently sent several case files to State House implicating senior GOK officials, and that the files had been sent back with instructions not to proceed. In our own discussions with Ringera, he refutes these allegations, claiming no interference or limits on his actions. In oblique terms, however, he acknowledges that KACC operates in a highly politicized (and thus restrictive) environment.

Comment: The U.S. Stance

21. (C) In essence, we have a government committed at the senior civil servant level to pushing ahead with important institutional and systemic reforms, some of which are beginning to have an impact in terms of closing off avenues used for corrupt activities. But we also have a political leadership that remains utterly unwilling to transparently

and aggressively root out high-level corruption within its ranks. This lack of will on the part of the leadership in turn threatens further progress on the longer-term institutional front. The old corruption networks may be frozen, but they have yet to be named, shamed, and dismantled. Other reporting indicates they are chomping at the bit to get back into business - when the time is right again. Those earnest permanent secretaries driving the reform process now can be dismissed or bullied out of office the same way John Githongo was when his efforts hit too close to home. This precarious situation won't change for the better anytime soon. Given the complex equities in a coalition government deeply divided over region, tribe, politics, and personalities, and in which there is probably at least a little dirt on everyone, we view it as highly unlikely that the Kibaki administration in its present form will ever be more transparent and aggressive in pursuing the corrupt ministers and presidential advisors operating in its midst. As such, it has no chance of ever recovering the credibility it owned when it came to power.

122. (C) Where does this leave us? In our view, we should continue to engage and, where it is sensible, assist in the longer-term effort to improve the legal and institutional framework for combating graft, including by strengthening the DPP as we are doing now, and perhaps venturing into new areas, such as procurement reform through the MCC's Threshold Program. In addition to the substantive impact our assistance can have, it has the added benefit of signaling to reformers in the GOK that we stand with them. At the same time, we need to regularly make clear both privately in our conversations with the leadership, and in our public statements, that we remain deeply disappointed by the lack of accountability and political will on the part of the Kibaki administration. We need to also make clear that our assistance and support is conditional and that any backsliding on the legal and institutional fronts will threaten our cooperation and assistance in the same way as happened when John Githongo resigned in February.

BELLAMY